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SUPREME COURT OF THE UNITED STATES

October Term, 1945

No. 444

FLORENCE B. BIGELOW, MARION B. KOERBER, JOHN E. BLOOM and WILLIAM C. BLOOM,
Petitioner-Plaintiffs,

vs.

RKO RADIO PICTURES, INC., a corporation, LOEW'S INCORPORATED, a corporation, TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation, PARAMOUNT PICTURES, INC., a corporation, BALABAN & KATZ CORPORATION, a corporation, VITAGRAPH, INC., a corporation, WARNER BROS. PICTURES, INC., a corporation, WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, a corporation, and WARNER BROS. THEATRES, INC., a corporation,
Respondent-Defendants.

BRIEF FOR RESPONDENT-DEFENDANTS

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BIGELOW, et al.,
Petitioner-Plaintiffs,

vs.

RKO RADIO PICTURES, INC., et al.,
Respondent-Defendants.

BRIEF FOR RESPONDENT-DEFENDANTS

This case is before this Court on the plaintiffs' petition for certiorari, allowed November 5, 1945, 325 U. S. III, to review that part of the decision of the Circuit Court of Appeals for the Seventh Circuit handed down August 3, 1945, 150 F. (2d) 877-885; R. 2263-75; which adjudged that in the District Court no evidence was submitted that the plaintiffs had been injured in their business or property by the conspiracy found by the jury, or by the acts done pursuant thereto, and no evidence of even an approximate amount of any such damages; by reason whereof, the Court of Appeals reversed the judgment for the plaintiffs in the District Court of the United States for the Northern District of Illinois, Eastern Division, and directed the entry of a judgment for the defendants *non obstante veredicto*, 150 F. (2d) 883-885; R. 2275.

The verdict and judgment in the District Court of a conspiracy and the approval of this in the Circuit Court of Appeals has put at rest for this case the defendants' contention to the contrary, notwithstanding the defendants' continuing belief that the jury erred as to the fact so found. It is the second step in the plaintiffs' case which is now under review in the Supreme Court, after a decision in the Circuit Court of Appeals favorable to the defendants on that step, namely, the absence of any injury to the plaintiffs from that conspiracy, and the things done pursuant to it.

A conspiracy in restraint of trade in violation of section 1 of the Sherman Anti-Trust Act, 26 Stat. 209, 15 U. S. C., sec. 1, is not of itself a violation of private rights. Any right of the plaintiffs to recover must meet the additional requirements of section 7 of the original Act, section 4 of the Clayton Act, 38 Stat. 731, now become 15 U. S. C. sec. 15; that is, the plaintiffs must be persons "injured in their (his) business or property."

Opinion of the Circuit Court of Appeals

The Circuit Court of Appeals in its opinion deals with the question of injury to the plaintiffs as follows:—

"We think the question whether the evidence supports the damages is of a more serious nature. The amount of this verdict was required by statue to be trebled by the judgment. In this respect neither the jury nor either court had any discretion. The verdict should represent actual damage sustained, and two thirds of the judgement is a penalty which Congress has seen fit to impose in such cases upon a guilty defendant. The penalty should in no manner militate against plaintiff's right to recover, nor does its infliction furnish any proof whatever of defendants' guilt. The jury must base their verdict upon a preponderance of all the competent evidence. Our duty is to affirm if the verdict was based upon substantial competent evidence (R. 2271).

"The burden was upon plaintiffs to prove that they were damaged as a direct result of the illegal conspiracy, and to submit evidence from which the jury could reasonably determine or approximate the amount. This we think they did not do. They sought to recover and did so because of the illegal conspiracy which was based upon the illegal license. Their object was to rid themselves, as well as the defendants, of the Chicago system. They vigorously contended that if they were permitted to purchase defendant's product by bid on an open market, the net profit of their theater in exhibiting those products would exceed their net profit under the Chicago system. It would seem then that the measure of damages in such case would be the excess, if any, of the former over the latter. The latter they knew and proved; the former they did not know, nor did they attempt to prove or approximate it by competent evidence. On this phase of the case they merely proved the normal earnings of their theater for five years immediately preceding their ownership, when it was

owned and operated by their parents under the Chicago system of release (R. 2272).

"The undisputed evidence is that plaintiffs neither operated nor assisted in operating any theater prior to their ownership of this one, and these facts would only prove that matters other than the illegal Chicago system had proximately caused the damages assessed by the jury."

These are the facts on which the Circuit Court of Appeals based its direction of a judgment for the defendants.

The judgment of that Court is that, on the evidence most strongly construed for the plaintiffs and found by the verdict of the jury, no injury to the plaintiffs resulting from the conspiracy had been shown. This is stated in terms of lack of evidence. This is not lack of evidence of an existing fact. The lack of evidence is because the fact of injury did not exist.

To test the soundness of this decision it is necessary, first, to define the conspiracy which the jury has found to exist and, second, to determine what would have happened to the plaintiffs if there were no such conspiracy during the period from November 1, 1936 to the filing of the complaint in 1942.

The Conspiracy as Found by the Jury.

As the verdict is a general verdict and not a special one, the terms of the conspiracy must be determined from the evidence most favorably construed for the plaintiffs and enlightened by the instructions given to the jury. So determined, this is the conspiracy:

Balaban & Katz Corporation, known as B. & K., operating some fifty to fifty-five theatres in Chicago and in its suburbs (150 F. 2d. 880; R. 2264, 1595; Ex. 45), in 1927 or before (R. 540, 131), when a subsidiary of Paramount Pictures, Inc., known as Paramount, in order to increase the box office receipts in their Loop theatres and their pre-release theatres, joined in a conspiracy with the defendant distributors, Paramount Pictures, Inc.; Vitagraph, Inc., a subsidiary of Warner Bros. Pictures, Inc.; Twentieth Century-Fox Film Corporation; Loew's Incorporated; and RKO Radio Pictures, Inc., to adopt and carry out the Chicago plan for the release of pictures on consecutive runs, clearance time between them, and stated minimum admission prices, at the theatres receiving the respective runs; and to license the defendant exhibitors to play on the earlier and more desirable runs; and to refuse to receive applications from the Jackson Park theatre, now belonging to the plaintiffs, except upon a later run, and thus to prevent the plaintiffs from competing freely with the defendant exhibitors for a run of their own choice, on the basis of what they were ready, able, and willing to bid for such a run.

In 1930 the defendant Warner Circuit Management, another Warner subsidiary, began to acquire theatres in Chicago. They now operate about twenty theatres in Chicago (R. 2065, Warner Ex. 12). These theatres are situated outside the Loop district. Thereupon Warner, so it is found, became a party to the Chicago release system in this additional capacity.

The method of release in Chicago, upon which it is thus found that the defendants have conspired, has been in operation at least eighteen years, and from a time prior to the revolutionary adoption of talking pictures instead of silent pictures.

In those eighteen or more years each distributor has leased its first runs for exhibition in the large Loop theatres with a clearance of about three weeks after close of the first run exhibition; and its second run in the A pre-release weeks, covering three weeks; and the third run in the B pre-release weeks, covering the next two weeks; and the fourth run in the C pre-release week, covering one week; and the fifth and succeeding runs in the weeks of general release, the first of which thus begins with the tenth week after the Loop run.

On the following notes to this page 6 these facts are elaborated.

The four plaintiffs as partners have been the owners of the Jackson Park theatre, a motion picture theatre on the South Side of Chicago, since November 1, 1936. At that time, they acquired it from their parents, Edward L. and Marie C. Bloom.

The defendants RKO Radio Pictures, Inc., Loew's, Incorporated, Twentieth Century-Fox Film Corporation, Paramount Pictures Inc. and Vitagraph, Inc. are distributors of motion picture films.

The defendant Balaban & Katz Corporation is a motion picture exhibitor which operates about fifty theatres in Chicago and its suburbs, including the Tivoli, Tower and Maryland theatres on the South Side of Chicago. Balaban & Katz Corporation is and has been since 1925 a subsidiary of Paramount Pictures Inc.

The defendant Warner Bros. Circuit Management Corporation is an exhibiter which operates about twenty theatres in Chicago, including the Avalon, Jeffery, Grove, Shore and Hamilton theatres on the South Side of Chicago. These were acquired in 1930. Warner Bros. Circuit Management Corporation and Vitagraph, Inc. are subsidiaries of the defendant Warner Bros. Pictures, Inc. The defendant Warner Bros. Theatres, Inc. is also affiliated with Warner Bros. Pictures, Inc. and merely holds title to certain of the Warner theatres.

Motion picture films may be classified as feature films, short subjects and newsreels. A feature film, with which this case is concerned, is a photoplay recorded on from 4,000 to 10,000 or 12,000 feet of film and comprises the principal item of entertainment in the usual motion picture program.

Motion picture films are first photographed on film negatives, from which are made positive prints which are projected onto the screens of motion picture theatres. The cost of producing the negative of a modern feature film ranges from about $200,000.00 to several million

dollars. The cost of each positive print is from $150.00 to $900.00, depending upon its length and whether it is black and white or in technicolor.

There are approximately 17,000 motion picture theatres in the United States and a superior feature film may be exhibited in as many as 13,000 of these theatres. Approximately 75% of the theatres pay a license fee to the distributor less than the cost of a single positive print. Many pay as little as $10.00 to $25.00. It is economically impossible for a picture film to be exhibited simultaneously in all or in any large portion of the theatres desiring to exhibit it. A distributor must limit the number of positive prints of any one picture to 200 or 250 and must license the exhibition of each such print successively in as many as 50 theatres in order to recover the cost of producing the negative, the cost of the positive prints and other costs of doing business and profit, if any.

Motion picture films are copyrighted and they are distributed by licensing their exhibition under copyright upon such terms as may be agreed upon between the exhibitor and the distributor and contained in a license agreement or "film contract".

Each defendant distributor has a branch office or "film exchange" in Chicago from which it serves its own pictures to theatres in that city and in surrounding territory. In addition to employees who physically handle the films and a clerical staff, each exchange has a sales staff which negotiates film license agreements with exhibitors under the direction of a branch manager.

Film license agreements entered into between a distributor and an exhibitor commonly designate the films (pictures) covered by the agreement, the theatre or theatres of the exhibitor in which the films are to be exhibited, and as to each such theatre the "run" in which films are to be exhibited, the "clearance" granted the exhibitor, the license fee or "film rental" to be paid to the

distributor and the minimum admission prices to be charged by the exhibitor for the exhibition of the particular distributor's pictures licensed for exhibition.

Each successive exhibition of a feature film is known as a "run." In a given area there are a first run and one or more subsequent runs. Priority of run is one of the elements of value in a license to exhibit a feature film. Frequently license agreements provide that a period of time shall elapse between the close of the exhibition in the licensed theatre and the beginning of the run in specified competing theatres. Such a period of time is called "clearance". Clearance is another of the elements of value in a license to exhibit a feature film. It enhances the exclusiveness of the run in connection with which it is granted for the brief period of the clearance.

Each distributor attempts to license the successive runs of its films in such theatres, with such clearance and for such license fees as will produce for it the greatest aggregate revenue in the whole competitive area. The largest, finest, best located and best operated theatres generally can earn and are willing to pay the largest license fees and are therefore selected as licensees for the earliest runs, with priority of run and clearance over competing theatres. In like manner and based upon like considerations each distributor selects from among the remaining theatres its licensees for each subsequent run and attempts to reach a satisfactory agreement with each.

The run and clearance of each account sold are agreed upon as part of the negotiations. When the negotiations are with old customers, run and clearance are generally the same as in the previous season's license agreement, unless one party or the other suggests some change. Usually the run and clearance are written into the license agreements. Sometimes, in cases of exhibitors operating a number of theatres, the runs and clearances are written up separately, but in any case they are part of the con-

tract and form a vital part of the consideration for the license fees to be paid by the exhibitor.

The license fees paid by exhibitors to distributors are sometimes specified sums, called "flat rentals", sometimes percentages of the exhibitor's box office receipts and sometimes a combination of both. In Chicago they range from $10 or $12 in the smallest and poorest theatres to $5,000.00 and upwards in some of the largest first run theatres.

A distributor, having selected a customer for a specified run of certain of its films, and having negotiated other satisfactory terms of agreement with the exhibitor, commonly agrees with the exhibitor that the latter will not charge less than certain admission prices specified in the license agreement during the exhibition of the licensed films at his theatre, although in recent years the admission prices charged by theatres have generally exceeded the minimum specified in the contracts.

Feature motion picture films are licensed according to run and clearance wherever in this country motion pictures are shown. Unless they were so licensed the distributors could not derive enough aggregate film license fees from their exhibition to make possible the production of the kind of feature films to which the public has become accustomed.

The Plaintiffs Have Not, on the Evidence, Been Injured in Their Business or Property By the Conspiracy Found.

It seems axiomatic that injury to the plaintiffs in their business or property must be determined by a comparison of the profits which they made in the period of the conspiracy found during which they operated, with the profits or losses which they would have made in that period if there was no conspiracy.

There is a complete absence of evidence, due to the absence of fact, as to the profits or losses which the plaintiffs would have made in the period of their operation if there was no conspiracy.

The plaintiffs make no claim for any period before November 1, 1936. As of that date the plaintiffs acquired from their parents the good will and physical property of this theatre and the adjacent rentable property. They paid for all this $390,000 (R. 108, 607, 598). The plaintiffs bought no right of action against the defendants for any depressing influences on the value of the purchase which could be attributed to what had gone before. If there was any right of recovery for the past it belonged to the sellers, and not to the plaintiffs. If there had been depressing effects on the value of the property and good will by the defendants' conduct in the past, what the plaintiffs bought was that depressed value. The theatre bought had been for some ten years or more, a theatre playing pictures on fifth runs.

In their complaint the plaintiffs say that they have operated this Jackson Park theatre since November 1, 1936 (R. 5); that the defendants will not license them any feature film for exhibition prior to the first week of general release, that is, the fifth run; that it is impossible to operate the theatre profitably unless first run feature pictures can be obtained on a competitive basis (R. 9); and as a result of the conspiracy the plaintiffs' business has been

subjected to a net loss of earnings in excess of $120,000 (R. 11). No claim is made that run and clearance are inherently wrong.

Lead plaintiff, Florence B. Bigelow, testified: "We want to buy them (pictures) as I go out and buy a hat, what I want, before anybody else wants it, and in competition you might say, in an open market. And that is what this (case) is all about" (R. 126).

The record is devoid of any evidence that the conspiracy found reduced the net profits of the plaintiffs by a single dollar from what they would have been if there were no conspiracy operative after November 1, 1939. The first step in the inquiry is to find out what would have happened to the plaintiffs in the operation of the Jackson Park theatre in the period of their claim if there were no conspiracy.

Unless but for the conspiracy they would have obtained pictures earlier and on terms as favorable or better than they did, lateness is not chargeable to the conspiracy.

Not even a guess can be made with wisdom that the pictures would have come earlier if there were no conspiracy. The history of the development of the theatre business in Chicago bears this out.

In 1916 Edward I. Bloom, the plaintiffs' father, opened the Jackson Park theatre for the exhibition of motion pictures in a neighborhood business district on the South Side of Chicago (R. 404, 698). The theatre now has 1429 or 1458 seats. When it was opened it had, and it still has, a number of smaller competitors, including the Hamilton theatre, a 999-seat house (R. 404, 405; Pl. Ex. 156-A; R. 578, 2059).

Leo Robert Salkin, a witness for the plaintiffs, testified that he managed the theatre from 1918 to 1923 (R. 311) and that at that time the only theatres in competition with the Jackson Park theatre were the Lexington, the Drexel, the DeLuxe, the Kimbark, and the Hamilton, and later the Woodlawn.

At the present time the competing theatres about which the plaintiffs complain in this suit are seven newer and larger theatres, all opened within a two-mile radius of the Jackson Park theatre between 1918 and 1927. These are set out in the opinion of the Circuit Court of Appeals (R. 2267; 150 F. 2d 881) as follows:

Theater	*Capacity*	*Began*	*Owner*		*Position*
Tivoli	3474	1921	1925	B & K	A Pre-Release
Tower	2995	1923	1928	B & K	B Pre-Release
Avalon	2385	1927	1930	Warner	A Pre-Release
Jeffery	1804	1924	1930	Warner	C Pre-Release
Grove	1856	1925	1930	Warner	C Pre-Release
Maryland	1499	1918	1928	B & K	C Pre-Release
Jackson Park	1420	1916	1936	Pflfs.	1st week General Release
Shore	1496	1927	1930	Warner	1st " " "
Hamilton	999	1916	1930	Warner	2nd " " "

The Tivoli, first on this list, owned in 1925 by B. & K., was built by B. & K. in 1921 (R. 409-414; Pl. Ex. 156-A; R. 578, 2059). B. & K. did not become affiliated with Paramount until 1925. In 1928 B. & K. bought the Tower and Maryland theatres (Pl. Ex. 45; R. 432, 1595). In 1930 the defendant Warner Circuit Management bought the Avalon, Jeffery, Grove, Shore, and Hamilton theatres (Warner Ex. 12; R. 1031, 2065). 1930 was the first Warner theatre acquisition in Chicago.

The brief for the plaintiffs (p. 7) mistakenly states that the Jackson Park was able to buy pictures ahead of the Maryland and Jeffery during the years 1918-1924. Leo Robert Salkin, the manager of the Jackson Park in the early days, left it in 1923, before the Jeffery was built. Richard Salkin, the present manager, did not become manager until 1927 (R. 131). Except for three pictures, the Jackson Park did not play ahead of the Jeffery at any

time (R. 2089). With negligible exceptions, the Jackson Park never played ahead of the Maryland. In the eight years 1918-1925 the Maryland, then named Woodlawn (R. 410), played 171 pictures ahead of the Jackson Park, and the Jackson Park played five pictures ahead of the Woodlawn (RKO-Loew's-Fox Ex. B, R. 2089).

There is no evidence that after these theatres were built the Jackson Park played ahead of them. As the larger and much better theatres were built the relative playing position of the theatres had taken on substantially their present sequence before 1927 (R. 409, 708, 203-207; Loew's Exs. A to F, R. 169; RKO-Loew's-Fox Exs. A, B, R. 410, 168; RKO-Loew's-Fox Exs. A, C, R. 411, Pl. Ex. 156-A, R. 170, 412; RKO-Loew's-Fox Ex. D, R. 412, 413, 408, 409).

Each of the above named newer and larger theatres, except the Shore theatre, was licensed to exhibit pictures on some run ahead of the Jackson Park theatre almost from the date when such newer and larger theatre was opened. The three largest of them, the Tivoli, Tower and Avalon, originally played on the South Side first run, each using different pictures from the others (R. 410-413). The Maryland, Jeffery and Grove played the runs between the first run on the South Side and the run of the Jackson Park theatre (R. 409, 412, 414). The Shore, the smallest of the next theatres, played on the same run as the Jackson Park (R. 409). The Hamilton, older and smaller than the others, continued to play on the run following the Jackson Park (R. 414).

By 1927 the successive runs on which the films customarily were leased for exhibition in Chicago had developed into the order stated in the table above. They were so recognized in trade usage (R. 415, 416).

As the Court of Appeals says (R. 2267; 150 F. 2d 881), for fifteen years before this suit was brought the respective playing positions of these theatres were substantially

as shown above and none of these theatres was affiliated with any distributor until many years after such theatre had acquired its playing position. With the exception of the Hamilton for a short period, after acquiring these theatres none of the defendant exhibitors changed or attempted to change its playing position.

The first run in Chicago was called the Loop first run and was exhibited in one of the large downtown theatres. The next run was exhibited in certain of the largest theatres outside the downtown district, after the conclusion of Loop first run. This was called the A pre-release weeks (R. 161, 371, 636, 681). These theatres generally changed programs weekly (R. 372, 636).

The next run was exhibited in a somewhat larger number of outlying theatres in the weeks called the B pre-release weeks (R. 161, 373, 636, 681). These theatres changed their programs once or twice weekly (R. 374, 636). The next run was exhibited in the week called C pre-release week (R. 161, 375, 636, 681). These theatres generally changed programs twice weekly (R. 375, 636).

Beginning with the tenth week after Loop first run other neighborhood theatres were licensed to exhibit the picture in successive weeks of release, called the first, second and later weeks of general release (R. 161, 637, 681). These theatres changed their programs from two to four times weekly (R. 637). It was in this tenth week that the licenses were issued for exhibition in the Jackson Park theatre from 1927 or before.

Pictures were exhibited on the successive runs described at a descending scale of admission prices to the public ranging from 75 cents and upward at Loop first run theatres to as low as 20 cents in the weeks of general release (R. 681, 682).

By 1927 the customary runs or playing positions of the theatres involved in this case were as set out in the table above.

The B. & K. theatres and the Warner Circuit theatres continued in these playing positions except that the Tower theatre changed from the A pre-release weeks to C pre-release week in 1930, and to the B pre-release weeks in 1936 (R. 204-207; Pl. Ex. 45, R. 432, 1595; Warner Ex. 12, R. 1031, 2065, R. 514).

It is the normal course for a distributor to close its contracts with the owners of first run theatres before entering into negotiations with other exhibitors. Each distributor generally negotiated with B. & K. and the Warner Circuit before entering into negotiations with the operators of other theatres (R. 339, 380, 430, 922, 943, 1125).

The difficulties in the way of negotiating for later runs before the prior have been placed are obvious.

In the light of these historical considerations it cannot even be guessed that when the plaintiffs for the first time entered this business November 1, 1936, there was any prospect that even if there were no conspiracy, the plaintiffs would have had larger net earnings than they have in fact enjoyed since that date. In order to recover, the plaintiffs must establish this and they cannot establish it because it is not the fact.

If there were open competitive bidding for product, the plaintiffs were not in a preeminent position to obtain the product. Their bids must beat the counterbids of other theatres. If the plaintiffs raised their prices, the normal course would be a greater counterbid by the other theatres. The evidence does not permit a finding, and none has been made, that the plaintiffs would have prevailed in the bidding. No witness testified, even by way of estimate or opinion, what run the plaintiffs might have obtained or what runs their competitors might have obtained or what the plaintiffs would have had to pay for their run or what patronage their theatre could have attracted on such unknown run or what profits it might have made, if the plaintiffs had been permitted or compelled to bid against their competitors.

The film rentals actually paid by the competitive theatres are as follows (R. 178, 538-9, 822; B. & K. Ex. 11; R. 2077, Pl. Exs. 47, 49; R. 1712-21).

Theatre	1936	1937	1938	1939	1940	Total
Tivoli (A pre-release)	$112,777	$163,639	$165,452	$159,407	$141,788	$743,063
Avalon (A pre-release)	78,337	106,399	106,722	105,152	110,446	507,056
Tower (B pre-release)	57,015	66,431	60,919	69,580	76,362	330,307
Jeffery (C pre-release)	40,058	41,941	43,981	43,863	45,699	215,545
Maryland (C pre-release)	40,414	43,515	41,478	40,420	42,448	208,275
Grove (C pre-release)	34,891	42,459	35,443	32,540	33,474	178,807
Shore (1st week gen. release)	28,272	32,478	31,954	31,578	27,878	152,160
Jackson Park (1st week gen. release)	27,200	24,636	26,299	27,134	27,521	132,790
Hamilton (2nd week gen. release)	12,580	14,083	14,707	15,180	15,862	72,412

No injury was done the plaintiffs by the minimum admission price requirements; quite the contrary. Plaintiffs' witness, Richard Salkin, manager of the plaintiffs' Jackson Park theatre, never asked any distributor to have the admission price in that theatre's contracts reduced (R. 540). He voluntarily charged more than the minimum (R. 276). On the other hand, the Jackson Park theatre could raise its admission prices with no fear of being hurt by reductions below the required minimum price by any theatre playing ahead, concurrently or after this theatre.

Price upkeeping, whatever its effect may be on the interests of the buyer and the patron, does not hurt the competitor.

The brief for the plaintiffs (p. 10) says that there were some 300 independent theatres in the area affected by the Chicago release system which, so the jury has found, was adopted by the conspiracy, and that this was a price fixing conspiracy (p. 25) to keep up the admission prices in the theatres throughout Chicago, and (p. 30) that:— "The admission price sustains the entire industry and comes from the pockets of the public. It is forced to pay a price which, respondents admit, could never be obtained in the absence of the suppression of competition". These additional sums which the patronizing public pay increase by so much the box office receipts of the theatres, whose prices are thus kept up.

After the plaintiffs' manager, Richard Salkin, had testified, the defendants for the purpose of contradicting the witness (R. 563), were permitted to introduce the contents of a statement which he had signed on behalf of the Jackson Park theatre (R. 577) in 1932, when he was the manager of the Jackson Park theatre for the then owners, not the plaintiffs, at the request of Allied Theatres, an organization of independent theatre operators (R. 576, 564).

This petition stated (R. 560): "I believe it is for my best interest in the conduct of my business; and for the preservation and protection of the life of my theatre to be governed and regulated in the operation of my theatre business by the following playing position schedule, rules and regulations. I hereby express my desire to have each of the rules, regulations and playing position schedule contained herein to be adopted as a general trade practice for the theatres located in the cities of Chicago (and many other places in Illinois), or in any other cities, towns or villages located in the territory known in the industry as the 'Chicago City Release Area'". (R. 560). The schedule which followed the above statement set forth suggested minimum admission prices for each run of the "Chicago system of release".

This statement is of course not a binding admission by the plaintiffs because the witness was not representing them when he made it, but it expressed the view which the witness entertained in 1932 as to the advisability of such a system for the Jackson Park theatre.

There is no evidence to support a finding that the Jackson Park theatre, without this admission price protection, would have made as much in net profits as it did make when operating under that system.

The brief for the plaintiffs (p. 18) says that the Jackson Park theatre made its profits in the four years prior to July 28, 1937, in spite of the illegal conspiracy. In fact the Jackson Park theatre made those profits with the assistance and benefit to it of the Chicago releasing system and its minimum price requirements which the jury has found were adopted by conspiracy.

The lawfulness or unlawfulness of the system is not what determines whether it was financially beneficial or injurious to the Jackson Park theatre.

In the non-litigation hours of privacy, when deciding to make the admission prices at the Jackson Park higher

than the minimum requirement, no doubt the plaintiffs thought with complacency of this plan for the upkeeping of prices which they, without complicity in any conspiracy, could continuously enjoy and profit by.

This benefit is in no degree reduced by the fact that the defendants were actuated by the motive to increase their own profits in the operation of their theatres and their distribution profits by more profitable sales to the many theatres in Chicago which might have suffered from a price war.

It leaves the matter so that it cannot even be guessed wisely that the Chicago release system injured the plaintiffs.

The uncertainty is an indisputable fact. The brief for the plaintiffs unremittingly ignores this fact and seeks to have the contrary assumed, without any support in the evidence, and says that the Court substituted its own judgment on the facts, for that of the jury. This the Court did not do. It ruled as matter of law that there was no evidence which would justify a finding that any damage was sustained by the plaintiffs from the conspiracy found.

There is no basis for a guess even that the Chicago release system injured the plaintiffs.

Richard Salkin, the manager of the Jackson Park theatre, called for the plaintiffs, testified that what he would do as to admission prices would depend in part on what his competitors charged (R. 256), and that he did not think he would charge 30 cents if they were charging 20 (R. 258).

Injury to the net profits of the plaintiffs from the system found must be determined by the entire effect of that system in a comparison with the operations which would have taken place if there were no such system.

It is wholly a guess what those net profits would have been from November 1, 1936 to 1942 if the system was not in existence. There is no reason for guessing that these net profits would have been greater.

The operation of the Jackson Park theatre under the Chicago release system has been a profitable one. The plaintiffs, operating through a paid manager, have taken out in profits in just over six years, November 1, 1936 to December 31, 1942, on the plaintiffs' joint investment of $390,000, about $57,000 apiece (R. 603), amounting to about 15 percent on the investment, for each one.

There is no basis for a guess of so good a result without the price upkeeping which the system made possible.

The plaintiffs alleged as a part of the Chicago release system the adoption in Chicago of double featuring; but they offered no proof of such a conspiracy, and no proof of any injury attributable to such a conspiracy.

Double featuring consists of the exhibition on one program of two pictures of feature length, one of them chosen as a major attraction and the other of minor expectation.

The first appearance of double featuring in Chicago was for a few months in 1931 and 1932 (R. 847).

Thereafter, before any of the defendants' theatres double featured, a number of independent theatres in Chicago either resumed or began double featuring (R. 280). They were doing this as early as the summer of 1936 (R. 280).

At this time the theatres were facing the coming elimination of the box office stimulation from Bank Night, an impressive attraction hereinafter described, which was thought to be in violation of an ordinance (R. 846). To meet this difficulty B. & K. studied the various methods of box office stimulation through the country and Chicago. They observed that double features in Chicago around them after their run were being very successful. They decided to institute double features (R. 527, 847). This was done without reference to any other exhibitors in Chicago and without any understanding with any distributors as to the institution of the policy in any other theatre (R. 528).

B. & K. started double featuring in the Tivoli and some of their other theatres October 16, 1936. They introduced it later in others of their theatres (R. 846; Pl. Ex. 45; R. 432, 1595, column 1936, notation D. F.).

The plaintiffs' theatre, the Jackson Park, without force or requirement from any distributor and because it was in competition with other houses that had gone to double features, adopted the policy in February, 1937 (R. 217).

Warner Circuit Management learned of the double featuring from outside sources after B. & K. had introduced double featuring at the Tivoli (R. 1082).

James E. Coston, the district manager for these Warner theatres, had observation made of the effect of this policy. He watched to determine whether the B. & K. theatres in which double featuring was introduced were improving their business. He had the cashiers at the Warner theatres observe whether people were asking for double features, and write down remarks made by ticket purchasers. He observed that the business at two of the Warner theatres took a decided drop. Warner began using double features at the Avalon theatre, December 26, 1936, and in some of their other theatres in January and February, 1937 (R. 1083, 1084). Warner conducted comparative investigations in the theatres in which they introduced double featuring and those in which they did not. The double feature theatres had some improvement in business in these theatres. Warner continued single featuring at the Jeffery theatre from April to August, 1937 (R. 1086). Business fell off. Beginning in August, 1937, the Jeffery theatre adopted a straight double feature policy as used by its competitors (R. 1087). This is the beginning of Warner's straight double feature policy. Warner has no Loop theatres (R. 1069).

The adoption of double featuring by Warner was without discussion with B. & K. (R. 1082). It had nothing to do with the protection of the theatres in the Loop (R. 653).

It had solely to do with the successful operation of subsequent run houses (R. 653).

In adopting the policy Warner did not have to arrange with any distributors for additional pictures, because it already had selective contracts with each distributor under which it could use all or only part of the distributors' films (R. 1089).

The above evidence is clear and uncontradicted. The record gives no indication of any concert for double featuring among any of the defendants.

There is no more basis for saying that the defendants conspired in this respect than for saying that the plaintiffs conspired in the adoption of the policy. The policy was started by the independent theatres at least as early as the summer of 1936. The plaintiffs observed that their competitors were doing this (R. 217). They even went to treble featuring later (R. 217). They adopted the policy before Warner decided to adopt it. The plaintiffs obtained the pictures for the double featuring from the distributors. Their contracts did not require them to double feature (R. 217).

The double featuring at the plaintiffs' theatre did not have the effect of reducing the box office receipts or, as far as appears, of increasing the film rentals. The total film rental for Jackson Park for 1936 was $27,200.82 (Pl. Ex. 49; R. 1714, 1715). For the following six years it was never more, except for the year 1940, and averaged less (Pl. Ex. 49; R. 1716-1721). The average cost in these six years was $26,450.62. There is nothing to indicate added film cost as a result of double featuring. The plaintiffs make no claim on this account.

Double featuring increased the need for films. It did not double the requirements (R. 145, 146, 854, 855, 1088). This increase in requirements reduced the number of pictures which otherwise would be rejected by a theatre because deemed the less desirable for exhibition. With

double featuring the Jackson Park used approximately 300 pictures a year, and with single featuring 175 (R. 145, 146). The theatres having the first opportunity to license the pictures in making the selection normally would reject those deemed the less desirable. These rejects would then become available for following theatres to exhibit clear of the earlier theatre.

Richard Salkin described a picture which had not been shown around the Jackson Park theatre, so that not as many people had seen it, as a clear picture (R. 144), with more box office value on that account (R. 145). There was nothing to indicate that one clear picture would increase the box office receipts over two pictures on a single program. There was nothing to indicate that a general run of these clear rejects would produce as much in box office receipts as better pictures played after earlier runs. There was nothing to indicate that either the gross receipts or the net profits from November 1, 1936 to 1941 had been reduced by the double featuring. The receipts of the Jackson Park theatre for the double feature years 1937 to 1942, inclusive, were (Pl. Ex. 49, R. 1716-1721):

1937	$102,382.15
1938	92,934.83
1939	88,490.81
1940	83,772.77
1941	89,778.40
1942	95,394.39

These six years were all double feature years. The falls and rises within these years cannot be attributed to double features because the double features were in the high years and in the low years.

Many occurrences cause changes in theatre attendance. The conditions of prosperity or not in the particular neighborhood or locality have a marked effect. The attractiveness of the film product of a particular year has a marked effect. The selection of pictures within the avail-

able product has a marked effect. It is common knowledge that "Gone With The Wind" or "Snow White And The Seven Dwarfs" may attract a much larger attendance in a deferred run than a picture carrying a title in first run such as "Sadie's Engagement" or "Mrs. Humdrum's Wedding," with unknown or unpopular actors. Prosperity in one neighborhood or in the central area of a metropolitan district carries no assurance of prosperity in another neighborhood.

Nothing in the record indicates that double featuring caused any injury to the plaintiffs.

There was another most striking cause at work. That was the discontinuance of Bank Night at the beginning of the plaintiffs' operation of the Jackson Park theatre.

During the latter half of 1935 and nearly all of 1936 motion picture theatres in Chicago, including those involved in this case, offered their patrons on one or more nights each week the opportunity of playing "Bank Night", "Pay Night", "Screeno" or something similar. The general principle of all such games was that each ticket of admission to the theatre was also a lottery ticket, giving the holder a chance to win a cash prize put up by the management (R. 172, 173, 217, 649, 650, 843-845, 864, 865, 871, 872, 1078, 1079).

These games enjoyed immense popularity and greatly stimulated theatre attendance (R. 652, 845, 1079). Not all of those who bought tickets attended the theatre. The box office would remain open to sell tickets when there was no show going on in the theatre and people would drive about town buying tickets at several different theatres (R. 652, 871, 872, 1078, 1079).

At the end of December 1936 these games were stopped because of a court action indicating that they were illegal (R. 846).

Theatre receipts throughout the city thereupon fell off sharply (R. 652, 846, 1081, 2074-2083). This fall-off was

not due to the Chicago release system, but to the discontinuance of this gambling feature.

With the cessation of Bank Night at the end of 1936 the other South Side theatres generally took a bad slump in 1937. The defendants' witness Coston believed that the Bank Night cessation was a cause for this (R. 1080, 1081).

This coincident general slump is borne out by the exhibits showing it (Warner Ex. 16, R. 2071; Warner Ex. 17, R. 2073; Paramount Ex. 11, R. 2077). There was nothing in contradiction of Mr. Coston's testimony and no reason to doubt its accuracy. The plaintiffs made no denial of the downward effectiveness of the cessation of Bank Night. Many of these drops were in theatres that licensed pictures ahead of the Jackson Park theatre.

The sharp upgrade with the introduction of Bank Night and the immediate downgrade with its cessation at the Tower and Maryland and Jackson Park theatres is graphically shown in the exhibits (Paramount Ex. 12, R. 2079; Ex. 13, R. 2081; Ex. 14, R. 2083). The evidence furnishes nothing in conflict with these graphs. Coincident with the cessation of Bank Night the receipts of the Jackson Park theatre dropped from $123,067.45 in 1936 to $102,382.15 in 1937, a drop of $20,685.30.

There is nothing from which it can be guessed even that the plaintiffs' net income in the period from the beginning of their operations November 1, 1936 to the beginning of this action and thereafter was injured by the conspiracy found. The Circuit Court of Appeals so holds (R. 2275; 150 F. 2d 885).

The Positions Assumed in the Brief for the Plaintiffs are untenable.

The only damages claimed by the plaintiffs before the trebling are the amount by which they allege that the net profits of operation from July 28, 1937 to July 27, 1942 were decreased by the conspiracy found. There is no evidence that there was any such amount.

The plaintiffs are before this Court in consequence of the allegations of the petition for certiorari. This says (p. 7):— "Thus the sole question left in the case is whether evidence which compared earnings under single features with earnings under double features was pertinent".

In fact the question in this case is whether or not, on the evidence, the plaintiffs were injured by the conspiracy found, and to the extent of $120,000.

Whether or not the evidence was pertinent, it was insufficient to show any injury. The above quotation from the petition for certiorari immediately follows the statement of the figures, elsewhere discussed in detail, showing that the net profits for the period July 28, 1937 to July 27, 1942 were $125,659.99, less than the adjusted reckoning at $44,000 a year of the average annual profits in the preceding four-year period, which was partly a single feature and Bank Night period and partly a double feature period. The petition soliciting the writ of certiorari suggests that this method of determining the damages is the one on which the plaintiffs seek a review of the decision of the Circuit Court of Appeals.

In the brief dated January 4, 1946 for the plaintiffs (p. 13), the plaintiffs depart from this and say:— "Two methods of determining petitioners' damages resulting from the illegal conspiracy support the verdict, and it is petitioners' contention that the jury could use either method, or a combination of both, in reaching that verdict".

Such a combination is an impossibility because the elements in the two calculations could not co-exist, and the plaintiffs so recognized and stated at the trial.

In support of the first method the plaintiffs offered the evidence of an accountant to show that the balance of admission receipts over film rental of the Maryland theatre in the period July 28, 1937 to July 27, 1942, when the Maryland theatre was operating in C pre-release week, that is, fourth run, on a double feature policy with the price protections of the conspiracy found, exceeded the corresponding balance at the Jackson Park theatre for the same period, when double featuring in fifth run under the same admission price protection, by $115,982.34 (R. 477, 446, Pl. Ex. 47, R. 1712).

In support of the second method the plaintiffs offered the evidence of an accountant to show that the net profits of the Jackson Park theatre when operated in the four years prior to July 28, 1937, under the admission price protection of the conspiracy found and on a single and double feature policy and after a dubious rectification amounted to $44,000 a year, which if projected into a five-year period would be $220,000, and that the net profits of the Jackson Park theatre in the five-year period July 28, 1937 to July 27, 1942, when operated on a double feature policy and under the same admission price protection of the conspiracy found, amounted to $94,340.01, a difference of $125,659.99 (R. 476, 446, Pl. Ex. 48, R. 1713).

An emulsion of these two methods can give no base for a calculation. The first assumes that the plaintiffs obtain fourth run instead of fifth run and operate as the Maryland theatre operated, that is, under the protection of the price upkeeping conspiracy found and with double features.

The second assumes that the plaintiffs operate in fifth run with single features under the protection of the price upkeeping conspiracy found.

The two assumptions are inconsistent each with the other. They cannot co-exist. No calculation can be based on a combination of the two. Fifth run is not fourth run, and double featuring is not single featuring.

The brief for the plaintiffs (p. 13) would now add to the uncombinable emulsion the figures of the Jeffery theatre. This is another impossibility, for the very reasons above stated. To this is to be added the further fact that instead of 1420 or 1458 seats of the Jackson Park theatre, the Jeffery had 1804 seats, a larger capacity by more than 23 percent.

The foregoing impossibilities are not the whole of the story; for the plaintiffs recognized them.

Plaintiffs' counsel in arguing to the jury about the possibility of assessing damages on the basis of the failure of the plaintiffs to get C pre-release week, or fourth run, spoke of it as a subsidiary question and then, after describing open market buying, said:— "that is what this lawsuit is about, not about C week, or any other week. It is the right to buy pictures in an open market. So I say that that is a subsidiary issue, but it is an issue, it was an issue in the case, and becomes an issue in the event, and only in the event, as I see it, that you should find, and I don't know how in the world you could find it from the evidence in this case, that this system was reasonable" (R. 1247).

This mutual exclusiveness was clear. The plaintiffs were not asking damages for exclusion from the C week which existed only by virtue of the Chicago-system, unless the system were found by the jury to be lawful. It was only in that event that the plaintiffs claimed damage for being excluded from a lawful C pre-release week. The two methods could not be mixed.

Accordingly, the plaintiffs requested the Court to instruct the jury (R. 2268; 150 F. 2d 881) and in response the Court said:— "The Court instructs the jury that only in the event that you find that there exists no conspiracy or combination to fix minimum admission prices, or no unreasonable restraint of trade, by the defendants by

virtue of the Chicago system of release, will you have occasion to consider whether or not the plaintiffs demanded and sought to obtain a playing position in 'C' week" (R. 1275), and "The jury are instructed that if they find from a preponderance of all the evidence that plaintiffs have been injured by the alleged acts of the defendants, they must choose one or the other of said two theories of determining damage or the amount of damages" (R. 1270).

In addition to the inherent impossibility of calculating damages on the two theories emulsified, contrary to the plaintiffs' own position at the trial, there is the further obvious fact that the jury did not calculate the damages by the C pre-release method and did calculate them on the comparison of the net profits in one period with the net profits in another period, in both of which the operations were conducted under the protection of the upkeeping price system.

This is discussed in the next division of the brief for the defendants.

Under the C pre-release method the evidence furnished no figure in excess of the $115,982.34 above described, and the verdict was for more, namely for $120,000.

There are no presumptions to be indulged that a jury has found in defiance of the instructions given the jury and that they have found what the evidence does not permit.

As the verdict is not based on the C pre-release run method it is not of consequence that, as stated in the brief for the plaintiffs (p. 57), Richard Salkin testified to what the Jackson Park theatre could have done with C run; but the statement in the opinion in the Circuit Court of Appeals (R. 2273) that this was a mere guess is fully justified. Salkin never had conducted a fourth run theatre. He never had conducted a theatre except one protected by the price upkeeping Chicago release system. It was not the opinion of a qualified expert. It was less so than

that held inadmissible in *Bausch Machine Tool Co. v. Aluminum Co. of America*, 79 F. 2d 217, quoted infra p. 39.

In addition to all the foregoing, there was, on the evidence, no injury from the conspiracy, in the failure to get the C pre-release week. As has been stated above (p. 10 et seq.) there was nothing to indicate that in the absence of conspiracy this fifth run theatre would supplant prior theatres. For years before the beginning of the conspiracy shown the Maryland theatre played ahead of the Jackson Park. It did this from the time that it opened in 1918 for ten years before B. & K. acquired it. The priority, which the Maryland had, was not due to conspiracy.

The plaintiffs again in their reply brief on certiorari showed that the C pre-release method was not the one on which the verdict is based. They said (p. 2):— "The base for the measure of damages used by petitioners was the profit their theatre was able to earn in spite of respondent's conspiracy by use of the 'inferior' pictures which had not already been shown in respondents' competing theatres." . . . "Obviously, then, the measure of damages which governs the case is the loss of profits which resulted to petitioners' theatre when respondents illegally took away from it even the 'inferior' pictures which it had theretofore been able to obtain", and on page 3 as to the comparison with the earnings of the Maryland and the Jeffery:— "But all this is surplusage so far as the issue now presented is concerned".

It is manifest that the verdict was not based on the C pre-release method.

The plaintiffs' brief shows no reason to question the soundness of the decision of the Circuit Court of Appeals that the judgment should be entered for the defendants. The defendants do not contend that the plaintiffs have abandoned their application for an injunction (R. 2096, 2271) but this does not stand in the way of the judgment for the defendants ordered by the Circuit Court of Appeals.

The Damages Were Not Found by the Jury by Any Measure of Injury to the Plaintiffs Caused by the Conspiracy Found.

It is apparent to the point of demonstration that the verdict is for the difference between the adjusted average annual net profits of the plaintiffs' predecessors in the four years, 1933, 1934, 1935 and 1936, as submitted by the plaintiffs' accountant, and the average net profits for the five years beginning July 28, 1937 and ending at the institution of this action, July 28, 1942. The exact amount of this difference is $125,659.99. This is cut down to $120,000 because that was the amount alleged in the complaint.

The chief vice of this method is not in the lack of approximation in the calculation.

The chief vice of the calculation was that it bore no relation to the effect of the Chicago release system on the plaintiffs' profits. It looks like a calculation approximately, but it is not a calculation based on the controlling fact in the case.

With the help of the price upkeeping plan the plaintiffs' predecessors and the plaintiffs respectively, howsoever innocent of participation in the plan, made the profits which they made in the four years before July 28, 1937 in which they conducted their theatre under the influence of the plan.

With the help of the price upkeeping plan the plaintiffs, howsoever innocent of participation in the plan, made the profits which they made in the five years July 28, 1937 to July 28, 1942, in which they conducted their theatre under the influence of the plan.

The comparison is not of the slightest help in determining how much more or less profits the plaintiffs would have made in those years in the absence of the plan.

When meeting the need to go beyond speculation, conjecture or guess, it is alluring but not illuminating to put

forth a calculation as a basis for an approximation, if the calculation has no relation to the basis for recovery.

When it is known by a precise computation what profits the predecessors made in one period under the influence of the plan and by an equally precise computation what profits the plaintiffs made in another period under the influence of the plan, the detrimental, if any, effect of the plan on the plaintiffs' profits is left as much to a pure guess as it was before the calculation was made.

It cannot be guessed even that there were on the whole any depressing effects from the plan on the plaintiffs' profits. *A fortiori* it cannot be guessed even that those, if any, depressing effects exceed the profit-increasing effects of the admission price upkeeping plan.

The demonstration that the verdict was reached in this way is found in the evidence introduced, the argument made, and the charge given.

The plaintiffs' accountant testified to an account of the operations of the Jackson Park theatre for the four years prior to July 28, 1937 (R. 446, Ex. 48, R. 1713). During a year and a half of this period Bank Night was played, which made the comparisons improper. The comparability was attempted by assuming that the profits for 1936, without Bank Night, would have been the same as they were during 1935, when Bank Night was played half the year. There was no elimination of the Bank Night influence on the 1935 figures (R. 471). With these adjustments he arrived at an average annual net profit of $44,000 (R. 475, 476). From this he projected for the five years, July 28, 1937 to July 27, 1942, a total net profit of $220,000, shown near the bottom of Ex. 48. From this he deducted the actual net profits for the same period, $94,340.01, shown at the top of Ex. 48. This left a difference of $125,659.99, the last figure on Ex. 48 (R. 1713). Plaintiffs' counsel then argued (R. 1259): ". . . at the bottom of 48, you will find an average net profit for four years. And he

eliminated the 'Bank Night,' that is out of the case—you heard him eliminate that; and he did it fairly, he gave them the benefit of the doubt on every single dollar that he could. And he took as a base $44,000. And then he took the actual receipts for the succeeding years; and he ended up with a figure of $125,655.99 (sic). (Par.) You don't have to remember all of that figure, because we are only suing for $120,000. Somewhere along the line we didn't compute it when we filed our complaint, and we are limited by our complaint. You have got $120,000 of damages here."

It is obvious from the verdict that the jury was convinced that the accountant was accurate, and that his evidence supported the argument of plaintiffs' counsel above stated, in arriving at $120,000 as the amount of the damages.

The Court's charge to the jury approved this method of computation.

The charge covers eighteen printed pages (R. 1261-1278). About fifteen of these are directed to the existence or not of a conspiracy. About three pages are directed to the combined question of injury to the plaintiffs and damages. Within the three pages the Court said:—

"The third material and essential element which the plaintiffs must so prove is that as a direct and proximate result of some act or acts done by the defendants or some of them in furtherance of such alleged agreement, combination or conspiracy, the plaintiffs have been injured in their business or property" (R. 1267).

. . . . . .

"The jury are instructed that the plaintiffs cannot recover damage on the basis of profits which the Jackson Park Theatre had earned while it was playing pictures in the run or playing position with clearances and with minimum admission prices allegedly provided for and fixed by the system of release alleged to have been established, maintained and continued illegally by the defend-

ants, to the extent that such profits had been increased by the theatres paying in such run or playing position and exceeded those in a normal business. And the jury are further instructed that such profits must be reduced to the basis of normal profits if it appears from a preponderance of all the evidence that such profits may be so reduced (R. 1270).

"Plaintiffs seek to recover damages for the alleged acts of defendants on one of two theories, as follows:

"(1) The amount of money that plaintiffs' profits in the operation of the Jackson Park Theatre for the five years from July 28, 1937 to July 28, 1942, were less than they would have been had the gross receipts from admissions and the film rental expense of the Jackson Park Theatre been equal to the amount of the gross receipts from admissions and film rental expense of the Maryland Theatre of the defendant Balaban & Katz Corporation for said five year period.

"(2) The amount of money that plaintiffs' profits in the operation of the Jackson Park Theatre for the five years from July 28, 1937 to July 28, 1942, were less than five times the average yearly profits of said theatre for the four year period prior to said July 28, 1937, eliminating estimated 'Bank Night' receipts for the year 1936.

"The jury are instructed that if they find from a preponderance of all the evidence that plaintiffs have been injured by the alleged acts of defendants, they must choose one or the other of said two theories of determining damage or the amount of damages.

"If the jury selects the first theory of determining damages as above mentioned, they must first find from a preponderance of all the evidence what amount of the gross receipts from admissions and amount of expense of film rental of the Maryland Theatre for the said five year period from July 28, 1937 to July 28, 1942, was derived or resulted from the operation of the Maryland

Theatre under normal conditions of free and open competition and not from or as the result of the operation of said theatre in the playing position, under clearances and minimum admission prices allegedly provided by the so-called system of release and under double feature policy alleged and claimed by the plaintiffs to have been established, maintained and continued by defendants through conspiracy and unlawful agreement, and the jury shall use said gross admissions amount and said film rental expense so to be found by them as the factor from which to calculate the damages for said five year period.

"If the jury selects the second theory above mentioned to determine and fix damages, they must first find from a preponderance of all the evidence what if any portion of the yearly average profits of the operation of the Jackson Park Theatre for the four year period prior (eliminating certain 'Bank Night' receipts) to said July 28, 1937, was derived from operation under conditions of free and open competition and not from operation in the playing position, under the clearances and minimum admission prices of the so-called system of release and under double feature policy which plaintiffs allege and claim defendants by conspiracy established, maintained and continued, and the jury shall then use such, if any, portion of said yearly average as the factor from which to determine the damages sought to be recovered by plaintiffs" (R. 1270, 1271).

. . . . . .

"The Court instructs the jury that only in the event that you find that there exists no conspiracy or combination to fix minimum admission prices, or no unreasonable restraint of trade, by the defendants by virtue of the Chicago system of release, will you have occasion to consider whether or not the plaintiffs demanded and sought to obtain a playing position in 'C' week" (R. 1275).

. . . . . .

"If, however, you find from a preponderance or greater weight of the evidence that the defendants have agreed, combined or conspired to accomplish one or more of the objects charged by the plaintiffs and that the object of such alleged agreement, combination or conspiracy unreasonably restrained trade or commerce in motion picture films, and that in pursuance thereof the defendants have committed acts which have injured the plaintiffs in their business or property, then you must find from the evidence the amount of the damages, if any, suffered by the plaintiffs as a direct result of such injury.

"The damages, if any, which you properly may take into consideration in arriving at your verdict, if you find that the plaintiffs have established any right to recover damages are limited to those actual damages, if any, the amount of which can be determined from the evidence, and do not include claimed damages, if any, which are merely speculative, remote or uncertain. They must be proved by facts from which their existence is logically inferable and cannot be supplied by conjecture. The burden is upon the plaintiffs to prove not only the amount of such claimed damages, but the fact that they resulted directly and proximately from acts of the defendants, if any, done pursuant to the alleged agreement, combination or conspiracy. The burden is not upon the defendants to show that such claimed damages, if any, may have resulted from some other cause" (R. 1276).

. . . . . .

"The Court instructs the jury that damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded although the result be only approximate, and the Court further instructs the jury that if they find that a conspiracy exists among the defendants or some of them as charged, then such defendants found

to be in such conspiracy are not entitled to complain that the precise damages suffered by the plaintiffs cannot be measured with the same exactness and precision as would have been possible if the conspiracy had not rendered difficult the ascertainment of the precise damages suffered by the plaintiffs herein" (R. 1277, 1278).

One hearing this charge would gather from it that if they found a conspiracy, the way in which to compute the amount of damages was either at the amount which the plaintiffs' profits were less than they would have been had their gross receipts and their film rental expense been equal to the amount of the gross receipts and film rental expense of the Maryland theatre, or at the amount by which the plaintiffs' profits for five years, July 28, 1937 to July 28, 1942, were less than five times the accountant's estimated average yearly profits for the preceding four years.

However slight the injury found, the jury "must choose one or the other of said two theories of determining damages or the amount of damages". To do otherwise would be to disobey the instructions given.

The verdict is for the difference between the rectified earnings in the early period and in the later period.

In both periods the theatre was conducted under the Chicago release system which the jury has found.

It is evident, as the Court of Appeals says, that the amount of damages is not based on a lawful Chicago release system and a failure of the plaintiffs to get a better run within that lawful system (R. 2268; 150 F. 2d 881).

The plaintiffs emphatically recognized this, not only in their petition and briefs on certiorari hereinbefore quoted, but also in the District Court. In their brief in opposition to the defendants' motion for a new trial or for a judgment notwithstanding the verdict the plaintiffs as to the C pre-release method of assessing the damages said:

"Plaintiffs' First Theory of Damages."

"We will not waste time in discussing this theory because, as pointed out at page 9 of the defendants' motion papers: The jury's verdict assessed the plaintiffs' damages at $120,000. The jury therefore by their verdict, in assessing more than the plaintiffs claimed by plaintiffs' Exhibit 48 under Theory of Damages numbered (1) in said instruction, chose to determine damages or the amount of damages upon Theory numbered (2) as stated in said instruction" (p. 11). These Theories are described on pages 24 et seq.

There is nothing in the evidence or in the argument for the plaintiffs as to the amount of damages or in the charge of the Court to the jury or in the verdict to indicate that if there was no conspiracy or action pursuant thereto, the plaintiffs would have had net profits for the period November 1, 1936 to July 28, 1942 of $120,000 in excess of the net profits which they enjoyed in that period.

The comparison of profitable operations in two different periods both under whatever were the disadvantages and whatever were the admission price upkeeping advantages of the conspiracy found, sheds no light on the amount of injury, if any, done by the conspiracy.

The record is barren of evidence of any amount of damages, howsoever small, sustained by the plaintiffs from the conspiracy.

The damages were not found by the jury by any measure of injury to the plaintiffs caused by the conspiracy found.

The Applicable Principles of Law and Citations Bearing Thereon.

The plaintiffs in the case at bar claim as their only damages a reduction in net profits, which they claim were caused by the conspiracy to prevent them from bidding competitively for product. To maintain such a claim requires evidence of what the net profits would have been in the same period but for the conspiracy. The record is barren on this. It is not merely the absence of any particular kind of evidence, but the absence of any kind. This is because the fact did not exist. It is this fact which distinguishes the case at bar from any and all the cases in which a recovery has been permitted.

It is clearly established that the settled principles of proof by evidence apply to actions by private plaintiffs to recover under the Sherman Anti-Trust Law.

The plaintiffs must establish by a fair preponderance of the evidence, and not by speculation or conjecture, that the plaintiffs have been injured by a violation of the Act.

Until it is thus established it becomes unnecessary to consider the extent of certainty required to prove the amount of the damages resulting from that injury.

The decisions of this Court and of the Circuit Courts of Appeal are not in conflict with respect to this requirement of certainty of evidence to establish the fact that the plaintiffs were injured.

A violation of the Sherman Anti-Trust Act is not *ipso facto* an injury to the plaintiffs.

Decisions bearing on the foregoing which have been cited for the plaintiffs are set out below.

Palmer v. Connecticut Ry. Co., 311 U. S. 544, cited for the plaintiffs, does not bear on the question presented in the case at bar. In the cited case the Court held (559-561) that the earnings in a period of operation of a transportation line were a proper source for estimating the probable

profits of the same line for a limited period in the future where the actual profits of that period had not yet been earned.

In the latest decision in the Supreme Court cited on this subject, *Story Parchment Co. v. Paterson Co.*, 282 U. S. 555, there was evidence which, if believed, established that the defendants conspired to put the newly established plaintiff out of business, by a concerted reduction of the defendants' identical selling prices by one cent and later by a second cent a pound, and that thereby they succeeded in putting the plaintiff out of business. There was evidence that, if believed, established that the plaintiff in the effort to keep its business had met the price reductions of the defendants, and that these reductions multiplied by the number of pounds which they had sold amounted to $20,000. There was evidence that, if believed, established that the plaintiff had constructed an excellent plant economically at a cost of $235,000 and therefore worth that amount to a going business of the size of the plant's capacity. There was evidence that, if believed, established that the plant closed down was worth only $75,000. There was thus direct evidence which, if believed, showed by mathematical calculation that the amount of the damages was $180,000. The jury's verdict was for $65,000. The evidence of the violation of the Sherman Anti-Trust Act and of the injury to the plaintiff resulting therefrom was direct. The amount of the damage was mathematically calculable from the facts of which there was direct evidence, as above stated. Neither the decision nor the language of the Court gives any support to the proposition that the fact of injury can be established by speculation or conjecture. The language of the Court on this point of necessity for proof of the injury as distinguished from the amount of the damages, is to the contrary.

There is no evidence even remotely resembling this in character in the case at bar.

In the earliest decision of the Supreme Court cited on this subject, *Eastman Co.* v. *Southern Photo Co.*, 273 U. S. 359, there was direct evidence of the violation of the Sherman Anti-Trust Act and direct evidence that the plaintiff had been injured thereby. The plaintiff had been handling the goods profitably. The violation of the Act cut off the supply. Proof was shown of the amount of profits which would have been made had the plaintiff continued to have the goods. There were no uncertainties except as to the amount. That amount was calculable. The decision contains nothing suggesting any relaxation of the rule requiring proof of the fact of the injury by a fair preponderance of the evidence.

There is no evidence even remotely resembling this in character in the case at bar.

In the latest decision of the Circuit Court of Appeals cited on this matter, *Package Closure Corporation* v. *Sealright Co.*, 141 F. 2d 972, the District Court had dismissed the complaint because it did not show with sufficient particularity to give the court jurisdiction that the plaintiff was injured and thereby sustained damages from the violation of the Sherman Anti-Trust Act. The Circuit Court of Appeals reversed this on the ground that the complaint did allege a violation of the Act and the plaintiff's consequent loss of its investment in its plant, and the loss of prospective profits. The allegations showed the violation of the Act, the injury to the plaintiff, the consequent loss of the plaintiff's investment in its plant, and its loss of prospective profits.

There is no evidence even remotely resembling this in character in the case at bar.

It was of the above allegations that the Court said:— "In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only

approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise." The defendant has done no wrong to the plaintiff and so is not a wrongdoer until it is shown by a fair preponderance of the evidence that the plaintiff has been injured by the defendant's violation of the Act.

In the earliest case in the Circuit Court of Appeals cited on this subject, *William H. Rankin Co. v. Associated Bill Posters*, 42 F. 2d 152, the defendants had violated the Sherman Anti-Trust Act and the plaintiff had been injured thereby. As to the amount of the damages there was evidence of the profits of the plaintiff's business in the unrestricted period and of the normal increase from year to year. The Court said: — "The fact that this amount of the plaintiff's damages could not be expressed in exact figures did not make them speculative. There was no speculation as to the fact of actual damage. Its business had been seriously curtailed. The defendants had caused the damage, and cannot be permitted to escape liability because it is difficult for the plaintiff to express in terms of dollars the damages it has suffered."

There is no evidence even remotely resembling this in character in the case at bar.

This opinion gives no help to the contention that the fact of injury may be shown by speculation or conjecture, or by anything less than a fair preponderance of the evidence.

The scope of this opinion is defined by the same court five years later, two of the same judges sitting. This follows next.

In *Baush Machine Tool Co. v. Aluminum Co. of America*, 79 F. 2d 217, the evidence, if believed, established that the defendant had violated the Sherman Anti-Trust Act and that the plaintiff had been injured thereby. As to the

amount of the damages the plaintiff put in evidence the testimony of its chief executive officer Haskell, as qualified as a witness could be, and so found by the trial court by the admission of the testimony. The Court said:—"The plaintiff was permitted to show by Haskell his estimate of its loss of profits during the period for which recovery was permitted. As there had never been any profits and no reasonable prospect that any would be made was shown as of 1925, his estimate was nothing but a guess based on conditions contrary to fact. It was too speculative to be admissible. *Eastman Kodak Co.* v. *Blackmore* (C. C. A.) 277 F. 694; *American Sea Green Slate Co.* v. *O'Halloran* (C. C. A.) 229 F. 77; *Central Coal & Coke Co.* v. *Hartman* (C. C. A.) 111 F. 96. In *Wm. H. Rankin Co.* v. *Associated Bill Posters*, 42 F. (2d) 152, we upheld the admission of an estimate of lost profits, but there was a proper basis for estimate in that case afforded by a period of profitable operation prior to the defendants' unlawful interference which prevented a continuance of the former success."

In *Keogh* v. *C. & N. W. Ry. Co.*, 260 U. S. 156, 164-65, this Court reannounced the applicable principle from which there has been no departure:—"Finally, not only does the injury complained of rest on hypothesis (compare *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 222-224); but the damages alleged are purely speculative. Under § 7 of the Anti-Trust Act, as under § 8 of the Act to Regulate Commerce, *Pennsylvania R. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, recovery cannot be had unless it is shown, that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture."

In the many cases decided, different facts in one from another have produced different results in the application

of this principle, but the principle has been undeviatingly applied.

Cases described above

Central Coal & Coke Co. v. *Hartman*, C. C. A. 111 F. 96

Motion Picture Patents Co. v. *Eclair Film Co.*, C. C. A., 208 F. 416

Locker v. *American Tobacco Co.*, C. C. A., 218 F. 447

American Sea Green Slate Co. v. *O'Halloran*, C. C. A., 229 F. 77, 79

Noyes v. *Parsons*, C. C. A., 245 F. 689

Eastman Kodak Co. v. *Blackmore*, C. C. A., 277 F. 694

Jack v. *Armour & Co.*, C. C. A. 8th, 291 F. 741, 745

Hart v. *B. F. Keith Vaudeville Exchange*, C. C. A. 2d 12 F. 2d 341, 345, Certiorari denied 273 U. S. 703

Alexander Milburn Co. v. *Union Carbide & Carbon Co.* C. C. A. 4th, 15 F. 2d 678, 683, Certiorari denied 273 U. S. 757

Wawak & Co. v. *Kaiser*, C. C. A. 7th, 129 F. 2d 66

In *Twin Ports Oil Co.* v. *Pure Oil Co.*, 46 F. Supp. 149, 152, the District Court of the United States in the District of Minnesota, Fourth Division, said:—"At the outset, it must be recognized that, in every violation of the Sherman Act, there is no legal or logical inference that someone has sustained recoverable damages in a civil action." . . . "Every well-considered decision recognizes that the fact of damage must be established by clear and satisfactory evidence, while the amount of damage may be approximated if the fact of damage appears with reasonable certainty and definiteness." . . . "The mere fact that plaintiff enjoyed greater margins under the old contract does not establish that the decrease was the proximate result of the illegal conspiracy." . . . "Many causes,

economic and others, may have affected the spread other than the illegal acts of these defendants. Possibility or conjecture as to the causal connection between the wrong and the injury is insufficient. However, it is urged that the existence of the conspiracy, coupled with good business prior thereto and decreased business subsequent thereto, is sufficient to make out a claim for damages. Manifestly, this view cannot be sustained." . . . "But, in the alternative, plaintiff urges that the existence of a conspiracy, coupled with favorable business before and decreased profits afterwards, will furnish a basis for expert testimony as to the damages sustained and that, through such testimony at the trial, the causal connection will be established. But how can any expert express any such opinion on the basis of the facts alleged in the complaint?" . . . "What, then, is the factual basis alleged in the complaint upon which an expert can express any opinion as to the causal connection between the wrong and the claimed injury? Without additional facts and circumstances, his opinion would be sheer guesswork and in the realm of speculation and conjecture."

In *Prefect Theatres, Inc.* v. *Twentieth Century-Fox Film Corp.*, unreported, No. 581 Civil, in the District Court of the United States for the District of Connecticut, April 21, 1944, the Court, satisfied that there was evidence sufficient to permit the jury to find a conspiracy, directed a verdict for the defendants because: — "The record was devoid of evidence from which could reasonably be found that Prefect had suffered any substantial damage to its business or property resulting from the alleged conspiracy. This, I hold, was a fatal defect in the plaintiff's claimed cause of action." . . . "For it has long been established that proof of substantial damage is an essential element of the tort created by the Statute." . . . "The evidence here did not bring the case within the scope of the rulings in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*,

282 U. S. 555 and *Rankin Co. v. Associated Bill Posters*, 42 Fed. (2nd) 152. For here there was no evidence from which even by logical inference the fact, as well as the amount, of damage might be found. There was no evidence here, as in the *Story* case, of depressed sales prices resulting from the conspiracy from which the plaintiff's actual damage might be computed or estimated. Instead, this plaintiff claimed to have been injured by a loss of general corporate profits. But here, unlike the situation in the *Rankin* case, there was in evidence no proper standard for determining, by comparison or by logical inference, whether profits were lost by the plaintiff as a result of the claimed conspiracy. . . . (Emphasis supplied.) *there was no competent evidence from which it could be found that the plaintiff's earnings during the statutory period would have been greater if it had been allowed, in competition with neighboring first-run houses, to bid for first-run films, instead of operating—as perforce it did—as a second-run house at lesser expense.*"

These two decisions in the District Court are brought respectfully to the attention of the Supreme Court because so precisely applicable to the case at bar, and because rendered on the accumulated experience of the earlier decisions of the Supreme Court and of the Circuit Courts of Appeal.

In *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F. 2d 580, C. C. A. 8th, April 11, 1945, the Court affirmed the judgment of the District Court, 56 F. Supp. 569, for summary judgment for the defendants because, although the violation of the Anti-Trust Act had increased the plaintiff's gasoline gallon cost approximately 2¼ cents, the plaintiff's had correspondingly increased their selling price. The Court said:—"Plaintiffs are seeking, not compensation for damages suffered by defendants' illegal acts, but profits because of said acts." . . . "Plaintiffs' right to recover from defendants is dependent upon both the buy-

ing and selling prices." . . . "The mere fact that the existence of a conspiracy to raise prices is established is not sufficient ipso facto, to support a judgment for damages under the Sherman Act."

The Supreme Court denied certiorari to this decision October 8, 1945, 325 U. S. X, 66 S. C. R. 42.

The applicability of this decision to the case at bar is striking. The plaintiffs' profits have been rendered possible by an admission price rate rendered possible by the upkeeping effect on prior run admission prices, of the Chicago releasing system. How much of that profit increase is due to the effect of the plan cannot be estimated on the evidence. That it was substantial can hardly be doubted.

There is nothing to indicate that the plaintiffs sustained any loss of profits, because of the plan.

In *Victor Talking Mach. Co.* v. *Kemeny*, C. C. A. 3d. 271 F. 810, the jury returned a verdict for the plaintiff for violation of the Sherman Anti-Trust law and assessed damages in part for the plaintiff's consequent loss of profits. The Circuit Court of Appeals held that this assessment was error. The Court said (819):—"In any event we are constrained to hold that the learned trial judge fell into error when he permitted the jury to find damages by way of unrealized profits from evidence of profits which the plaintiff had made when engaged with the defendant in an unlawful business. Profits which the plaintiff could anticipate if he had been permitted to go on and sell Victor products were only such as he could earn lawfully in a competitive market. Such profits can not, we think, be ascertained from profits which he had earned under a system whose sole purpose was to maintain prices, restrict competition, and create monopoly."

In *First Nat. Pictures* v. *Robison*, C. C. A. 9th, 72 F. (2d) 37; Cert. Den. 293 U. S. 609, Rehearing Denied 293 U. S. 631, the plaintiff recovered judgment in the

District Court. The Circuit Court of Appeals reversed this (40) because a verdict for the defendants should have been directed. The Court said (40): — "It must be obvious at this juncture that the plaintiff is claiming a vested interest in the very monopoly she attacks as invalid; that is, she claims the benefit of the zoning in existence at the time the Seville Theater was opened, while denouncing the rezoning as a violation of the Sherman Anti-Trust Act, . . . (Par.) Upon what basis, then, can the plaintiff claim a right of recovery under section 7 of the Sherman Anti-Trust Act (15 USCA § 15 note, section 4, 38 Stat. 731 [15 USCA § 15]), which gives a right to treble damages to 'any person who shall be injured in his business of property by reason of anything forbidden in the antitrust laws.' Plaintiff's allegation and proof were of damage from rezoning and not of damage from zoning per se. The allegation we have quoted above. The proof offered was a comparison of receipts and profits before and after rezoning. The evidence presented no other basis for estimating the damage suffered by the plaintiff."

In both these cases the plaintiffs sought to show their injury from the violation of the Anti-Trust Act by the profits which they had lost during the period of violation affecting them as compared with the profits which they had made in an earlier period in which they had conducted business during the prevalence of the conspiracy.

Both plaintiffs failed, not on any doctrine of estopped or lack of clean hands, but because there was no basis for any estimate of damage. A comparison of profits in a period of operation under the influence of the restraint of trade with lesser profits in another period under the influence of the restraint of trade, furnishes no information that the plaintiffs have been injured in their profits by the restraint of trade.

In the case at bar the Circuit Court of Appeals could not permit judgment for the plaintiffs without departing

from the law as determined in the Third Circuit and the Ninth Circuit by these two decisions.

There is nothing to indicate that the plaintiffs sustained any loss of profits because of the plan.

A violation of the Anti-Trust Act is not *ipso facto* an injury to plaintiffs and it raises no inference of such an injury.

Clark Oil Co. v. *Phillips Petroleum Co.* 148 F. (2d) 580, C. C. A. 8th, April 11, 1945; Cert. denied October 8, 1945, 325 U. S. X, 66 S. C. R. 42

Northwestern Oil Co. v. *Socony-Vacuum Oil Co.* 138 F. (2d) 967; Cert. denied 321 U. S. 792

Jack v. *Armour & Co.*, 291 F. 741, C. C. A. 8th

Hart v. *B. F. Keith Vaudeville Exchange*, 12 F. (2d) 341, 345; Cert. denied 273 U. S. 703, C. C. A. 2d

Glenn Coal Co. v. *Dickinson Fuel Co.*, 72 F. (2d) 885, 887, C. C. A. 4th

Twin Ports Oil Co. v. *Pure Oil Co.*, 119 F. (2d) 747, 750, Cert. denied 314 U. S. 644, C. C. A. 8th

Twin Ports Oil Co. v. *Pure Oil Co.*, D.C., 46 F. Supp. 149, 152

In these last, the Circuit Court of Appeals said (750): —"The mere fact that the existence of a conspiracy to raise prices is established is not sufficient *ipso facto*, to support a judgment for damages under the Sherman Act. . . . It is to be noted that here a recovery is sought for triple damages, a privilege that immediately suggests necessary definiteness in the basis of damages as attributable to the violation of the Federal Act."

The District Court said (152): —"At the outset, it must be recognized that, in every violation of the Sherman Act, there is no legal or logical inference that someone has sustained recoverable damages in a civil action. A conspiracy under the Act may afford the Government the right to injunction or to the prosecution of criminal pro-

ceedings, but it does not necessarily follow that everyone who did business with the conspirators during the period were damaged, so as to enable them to recover in a civil proceeding. Every well-considered decision recognizes that the fact of damage must be established by clear and satisfactory evidence, while the amount of damage may be approximated if the fact of damage appears with reasonable certainty and definiteness."

There is nothing to indicate that the plaintiffs were injured by any infraction of the Anti-Trust Act.

The Decision of the Circuit Court of Appeals Serves the Public Interest.

In support of the petition for certiorari, counsel urged that the decision of the Circuit Court of Appeals was adverse to the public interest. The contrary is the fact.

No public interest is served by permitting plaintiffs, who have not been injured, to have a judgment for $360,000 and $30,000 attorneys' fees, $390,000 (R. 2127, 2247), a sum equal to the total purchase price of their theatre and adjacent income-producing (R. 1715-1721), rentable property (R. 108, 607, 598).

The Sherman Anti-Trust Act does not provide for *qui tam* actions by private individuals to enforce its penalties. It provides for a civil remedy to persons "injured in their (his) business or property", to recover damages threefold.

Plaintiffs who have not been injured have no right to recover damages under the Act. The trebling is a strong invitation to action by speculative persons claiming to be injured, but it is not designed to foment actions by those who are not injured, but who may hope to profit by the claim. A wise and just public policy is to discourage such.

The decision in the suit at bar, sets out no new principle. It applies the law which this Court has announced to give redress to those injured and not to enrich those not.

The argument to the contrary rests on a false premise that the plaintiffs have been injured. It proceeds to develop their plight as one of failure of evidence to prove the fact. In truth, the failure of evidence is only because the fact does not exist.

There is no probability even, that the plaintiffs were injured by the Chicago system of release. The benefits of a definite series of runs with clearance between them, both before and after the run enjoyed by the plaintiffs, and the benefits to them of freedom from admission price cutting and from apprehension of admission price cutting by their competitors in prior runs and in concurrent runs

and in later runs, which would force the plaintiffs to reduce their admission prices, all made for more box office receipts by the plaintiffs. Cases must be decided by evidence. That in the record in this case furnishes no reason even to guess that without these benefits the plaintiffs would have made, in the years 1937 to 1942, as much as they made in those years with these benefits. No assertion of such a guess supplies the absence of the fact of any injury in "business or property".

It would be vicious public policy to permit, in such a case, recovery of anything and, more emphatically, of three hundred and ninety thousand dollars ($390,000) (R. 2127, 2247).

Conclusion

This case is under review after the establishment by the finding of a jury that the defendants had conspired in setting up and practising the Chicago release system.

The plaintiffs were not injured by that system, on the evidence in this case, even if construed most favorably for the plaintiffs.

The damages claimed and stated in the verdict have not been calculated or approximated on the basis of the effect of this system on the plaintiffs.

Respectfully submitted,

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January 28, 1946